IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CHARTERED ACCOUNTANT REFERENCE No.1 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COUNCIL OF INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

Versus

JAYESH DHIRAJLAL BUDDH, FCA M/S. BUDDH ASSOCIATES

Appearance:

1. CHARTERED ACCOUNTANT REFERENCE No. 1 of 2005
MR SN SOPARKAR with MRS SWATI SOPARKAR for the Petitioner
Respondent appears as Party-in-person

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 11/05/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. This reference has been made by the Council of the Institute of Chartered Accountants of India (the Council) under Section 21(5) of the Chartered Accountants Act, 1949 (the Act) in respect of respondent - Shri Jayesh Dhirajlal Buddh.

2. Shri D.T.Padia, Income-tax Officer, Jamnagar (the complainant) made the following allegations against the respondent as stated by the Council in its statement of case.

"1.1 The business premises of the firm M/s. B. Viren & Co., Jamnagar (Assessee) were surveyed under Section 133A of Income-tax Act on 26th October, 1993. It was ascertained that the turnover of the firm as per books of accounts maintained by it exceeded the limit prescribed under Section 44AB. The statements of partners of the firm recorded on 26th October, 1993 under Section 131 reveal that the books of account for the period ending 31st March, 1991, 31st March, 1992 & 31st March, 1993 of the firm were not audited before the stipulated date. The Income tax returns were not filed by the assessee voluntarily for the Assessment Year 1991-92 by 31st October, 1991 and for Assessment Year 1993-94 by 31st October, 1993. The return was finally filed for these years on 27th June, 1994. An audit report, prescribed under Section 44AB was attached to the return of income furnished by the assessee for each year. The said audit reports were bearing the signature of the Respondent as under:-

Assessment Year 1991-92 : The date of signature is 28th October. (No year is stated).

Assessment Year 1992-93 : The date of signature is 26th October, 1992.

Assessment Year 1993-94 : The date of signature is 27th October, 1993.

1.2 The Respondent was issued the certificate of practice in August, 1992 yet he has

signed the audit report of B. Viren & Co. of Jamnagar for Assessment Year 1991-92.

1.3 There being delay in submitting the audit reports, penalties of Rs.1 lac each has been imposed on the assessee for these years which was confirmed in appeal before CIT (A)-II, Rajkot. Further, in a statement recorded on 26th October, 1993 under Section 131 of the Income-tax Act, Shri Ranchhoddas H. Barai, partner of the assessee had categorically stated that no audit of the books of accounts of the firm for the Assessment Years 1991-92 to 1993-94 had been carried out upto that date namely 26th October, 1993.

1.4 Thus, it is clearly established that the books of account were not audited before the stipulated dates and the audit reports furnished by the Respondent for the Assessment Years 1991-92 to 1993-94 were 'back dated'. For Assessment Year 1991-92, the Respondent was not competent to sign the audit report as on 31st October, 1991 since he was granted certificate of practice in August, 1992."

3. It is an admitted position that pursuant to the receipt of the complaint the Council followed the requisite procedure as prescribed under the provisions of the Chartered Accountants Regulations, 1988 (the Regulations). As the respondent has not alleged any procedural irregularities or illegalities it is not necessary to set out the details of the same. Suffice it to state that the Disciplinary Committee concluded that the respondent was grossly negligent in the performance of his professional duty and that his conduct was unbecoming of a member. Accordingly, the Disciplinary Committee held the respondent guilty of gross negligence within the meaning of Clause (7) of Part I of the Second Schedule and also guilty of "other misconduct" within the meaning of Section 22 of the Act.

4. On the basis of the aforesaid report of the Disciplinary Committee, the Council has recommended to the High Court that the name of the respondent be removed from the Register of Members for a period of 01 (one) year. The findings in support of the recommendations made by the Council broadly record and reiterate the

findings of the Disciplinary Committee and it is stated that the Council has decided to accept the findings of the Disciplinary Committee.

5. Mr.S.N.Soparkar, learned Senior Advocate appearing on behalf of the Council, has submitted that as the facts reveal the respondent had furnished three audit reports for Assessment Years 1991-92, 1992-93 and 1993-94 and each of the audit report bears date of signature as 28th October (without stating the year), 26th October, 1992 and 27th October, 1993 respectively for all the three years. That the returns for all the three years had been filed by the firm of M/s. B. Viren & Co., Jamnagar on the basis of such audit reports on 27th June, 1994. That the statements of partners of the firm recorded on 26th October, 1993, when survey under Section 133(A) of the Income Tax Act, 1961 (the Income-tax Act) took place, reveal that the books of accounts for the period ending on 31st March, 1991, 31st March, 1992 and 31st March, 1993 were not audited by the due dates for the respective years. It was further submitted that the respondent was enrolled on the Register of Members by the Council in August, 1992 and despite that the audit report for Assessment Year 1991-92 has been signed. That even if the complainant's suggestion that the audit reports were 'back dated' was not accepted it was apparent that for Assessment Year 1991-92 respondent was not competent to sign the audit report as on 31st October, 1992 since he had been granted certificate of practice only in August, 1992.

5.1 It was submitted that there was discrepancy in the written statement dated 28th November, 1998 tendered by the respondent and the statement dated 21st March, 1995 made under Section 131 of the Income-tax Act. That the respondent had at one place stated that the partner of M/s. B. Viren & Co. had collected the audit reports from the peon of the respondent in absence of the respondent and at other place the averment is that he had handed over the audit reports to the partner, and in both instances it was an admitted position that the audit reports did not bear the date when the signature was affixed by the respondent. It is further stated that all the three audit reports were prepared and handed over simultaneously on one day to the partner of the assessee firm which went to show that the respondent was guilty of an attempt to abet a fraud which the assessee firm wanted to perpetrate on the Income-tax Department. He, therefore, urged that the recommendations made by the Council be accepted on facts of the case.

6. In response to the notice issued by this Court the respondent has furnished written submissions dated 14th March, 2005 and has also appeared in person. It is submitted that the respondent had no intention to commit any fraud nor was the respondent inclined to abet any fraudulent activity and the only mistake that the respondent committed was parting with the original audit reports without affixing the date after signing the audit reports. It is further submitted that considering the point of time when the error was committed by the respondent a lenient approach may be adopted as the recommendation of the Council is very harsh and may result in affecting the career of the respondent. It is further stated that audit reports were prepared some time in April/May 1994 when the respondent's standing in the profession was less than two years and the respondent was a virtual fresher in the profession. That it is in these circumstances that the action of handing over undated audit reports may be appreciated and the respondent be not visited with any harsh penalty as recommended by the Council.

7. Under Chapter V of the Act which deals with MISCONDUCT, Section 21 relates to "Procedure in inquiries relating to misconduct of members of Institute". Accordingly, under sub-section (5) of Section 21 of the Act the Council has forwarded the case with its recommendations. On receipt of such recommendations, the High Court, under sub-Section (6) of Section 21 of the Act, is entitled to make any of the following orders, after hearing the parties, :

"(a) direct that the proceedings be filed, or dismiss the complaint, as the case may be;

(b) reprimand the member;

(c) remove him from membership of the Institute either permanently or for such period as the High Court thinks fit;

(d) refer the case to the Council for further inquiry and report."

8. Under Second Schedule, Part I, Clause (7) provides that a chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he is grossly negligent in the conduct of his professional duties. Section 22 of the Act defines "Professional misconduct" and reads as under:

"For the purpose of this Act, the expression "professional misconduct" shall be deemed to include any act or omission specified in any of the Schedules, but nothing in this section shall be construed to limit or abridge in any way the power conferred or duty cast on the Council under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstances."

By taking recourse to these provisions viz. Clause (7) of Part I of the Second Schedule and Section 22 of the Act the Council has made its recommendations.

9. It is necessary to take note of the fact that the complaint was made on 2nd January, 1998 but statement of the respondent was recorded by the complainant under Section 131 of the Income Tax Act on 21st March, 1995. On going through the entire statement it becomes apparent that the respondent has not set up any defence as such. The entire statement gives an impression that the respondent has stated the facts and the events as they occurred without trying to resort to any technicalities or prevaricate in any manner. The answers to the questions put reflect that the respondent has not tried to explain away his conduct and has also not tried to shield M/s. B. Viren & Company. From question No.12 and answer thereto it becomes apparent that the audit was carried out some time in April/May 1994. If this statement is appreciated in the right perspective it is clear that it is not possible to hold that the respondent is guilty of "other misconduct" as recorded by the Disciplinary Committee and the Council within the meaning of Section 22 of the Act.

10. In Paragraph No.26 of the report of the Disciplinary Committee the committee states that "The fact that the assessee firm may have misused the blank reports furnished may be true, but such a situation would not have arisen in the first place if the Respondent had taken care to date the Reports at the point of time when he was signing the same." Thereafter the Disciplinary Committee holds that the respondent was required to be conscious of the importance of the relevant dates in regard to the audit reports, and handing over the same without mentioning any date indicates a failure to diligently perform his professional duty. It is further held "On the date of signing audit report, the Respondent was fully aware that the possibility of imposition of penalty under Section 271B existed. Despite this awareness, handing over such undated reports is bound to

lead to a conclusion that whether by act of commission or omission on the part of the Respondent, the door was kept open for misuse by the assessee firm of the said audit reports. If a member of the profession permits such misleading documentation, he directly or indirectly becomes party to the attempt to defraud or mislead the revenue authorities."

10.1 As against that it is also necessary to take into consideration the findings recorded by CIT (Appeals) in the appeals filed by M/s. B. Viren & Co. against order imposing penalty under Section 271B of the Income-tax Act. It is recorded by CIT (Appeals) in the order dated 13th November, 1995 that "The only fact which is in dispute is whether the audit reports of these three years which bear the dates of 28.10.91, 26.10.92 & 27.10.93 were in fact completed on those dates or not." Thereafter while dealing with various contentions raised on behalf of the assessee firm before him, the CIT (Appeals) has categorically recorded on reference to the statement dated 26th October, 1993 made by one Shri R.H. Barai, a partner of the assessee firm, that the books of accounts for the three years in question had not been audited till the said date viz. 26th October, 1993. That Shri Barai was the main partner of the assessee firm. That Shri Barai had not retracted the statement, at least till the date of issuance of penalty notice viz. 17th October, 1994 and, therefore, the initial statement dated 26th October, 1993 was acceptable in preference. A further finding is that as per panchnama dated 26th October, 1993 regular books of accounts were found during survey on 26th October, 1993 for all the three years and the said books were impounded by the Assessing Officer on 28th October, 1993 and have remained in custody of the Assessing Officer since then. It is further found that "It is also noteworthy that the impounded books do not have any audit markings. No audit report for any year was found during the survey." This finding lends credence to the averment made by the respondent when his statement was recorded on 23rd January, 1995, that the audit was carried out on the basis of xerox copies of the account books and the original were never produced before the respondent.

10.2 The Commissioner (Appeals) has further found that the consolidated receipt for payment issued by the respondent on 31st May, 1994 would go to suggest that the books of accounts were not audited from year-to-year but were audited simultaneously at a subsequent point of time; and this finding is again in consonance with the statement made by the respondent that the accounts were

audited for all the three years together on a single day about 10 or 11 months prior to 21st March, 1995 when the statement was recorded i.e. some time in April/May 1994. It is not necessary to repeat various other findings recorded by the CIT (Appeals). Suffice it to state that on an overall reading of the appellate order it appears that there was not only no attempt on part of the respondent to abet any attempt to mislead the Revenue by the assessee firm, but the attempt on part of the assessee firm to throw the entire burden on the respondent was also not approved by the CIT (Appeals).

11. The Disciplinary Committee has recorded in relation to the appellate order of CIT (Appeals):

> "..... Although it is noted by the Committee that the findings of an independent authority in a proceeding against a party other than a Respondent cannot bind this Committee, this noting of the findings of the Commissioner of Income Tax, (Appeals), is only referred to as a matter of convenience and for the sake of brevity. The Committee makes it adequately clear that the finding of the Commissioner of Income Tax, (Appeals) against the assessee in no way decides the matter against the Respondent. These findings are given only for the sake of bringing out the detailed facts which have been adequately recorded in the said Order."

These observations have been reiterated and approved by the Council.

12. Both the Disciplinary Committee and the Council have lost sight of the fact that the findings recorded by CIT (Appeals) are having direct nexus with the conduct of the respondent and though, in a sense, they can be stated to have been made in proceedings relatable to a third party, strictly speaking they cannot be ignored and brushed aside as the Disciplinary Committee and the Council have done. The said proceedings emanated from the audit reports submitted by the respondent. The direct issue which arose for determination before the tax authorities, in context of provision of Section 271B of the Income-tax Act, was as to whether the assessee firm had any reasonable cause for not having its accounts audited by the prescribed dates and whether for this purpose the assessee firm was abetted or assisted in any manner by the respondent. In other words, whether the default on part of the respondent was of such a nature so as to absolve the assessee firm from penalty under

Section 271B of the Income-tax Act. Once the appellate authority found that this was not so and the respondent was in no way involved in an attempt to get the assessee firm any relief in relation to the penalty proceedings, the findings recorded by the appellate authority had direct bearing on the issue, at least for the purposes of ascertaining the quantum of punishment with which the respondent should be visited with, if not his guilt. Therefore, the approach of the Disciplinary Committee and the Council on this score is not correct in law.

13. However, taking into consideration the admitted facts it is apparent that the respondent was negligent in performance of his professional duty when the respondent parted with the audit reports for the three years in question without putting date after affixing his signature. Even if the said negligence can be termed to be "grossly negligent" as required by Clause (7) of Part I of the Second Schedule to the Act, the question that would yet survive is as to what would be commensurate punishment taking into consideration all the relevant facts which have come on record.

14. Considering the fact that the respondent had hardly two years standing in the profession when the default was committed, and further that the respondent has not set up any false defence, along with the findings recorded by CIT (Appeals), it would be in the fitness of things if the recommendation of the Council is modified so as to remove the name of the respondent from the Register of Members for a period of 01 (one) month in place of 01 (one) year. Accordingly, the Council is directed to remove the name of the respondent from membership of the Institute for a period of 01 (one) month.

15. The reference stands disposed of accordingly. There shall be no order as to costs.

Sd/- Sd/-

[D.A.MEHTA,J] [H.N.DEVANI,J]

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